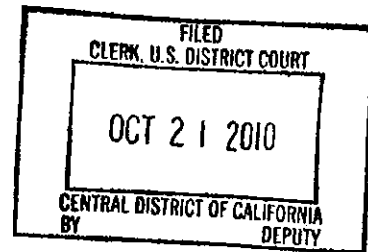


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7 SUKUMAR and SOUTHERN
CALIFORNIA STROKE
8 REHABILITATION ASSOCIATES, INC.

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11
12 PONANI SUKUMAR, an individual,
and SOUTHERN CALIFORNIA
13 STROKE REHABILITATION
ASSOCIATES, INC., a California
14 corporation,

15 Plaintiffs,

16 vs.

17 NAUTILUS, INC., a Washington
18 corporation,

19 Defendant.

CASE NO. **CV10-7930** ^{DMG} (22) →
COMPLAINT FOR FALSE
MARKING
DEMAND FOR JURY TRIAL

HILL, FARRER & BURRILL LLP
A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW
ONE CALIFORNIA PLAZA, 37TH FLOOR
300 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071-3147

1 Plaintiffs Ponani Sukumar ("Sukumar") and Southern California Stroke
2 Rehabilitation Associates, Inc. ("SCSRA"), allege as follows:

3
4 **I. NATURE OF THIS ACTION**

5 1. Plaintiffs Sukumar and SCSRA have suffered economic damages
6 resulting from the unlawful conduct of defendant Nautilus, Inc. ("Nautilus") by its
7 intentional false marking of products with patents that (1) never covered the
8 products that they are marked upon or affixed to; and/or (2) do not cover the
9 products that they are marked upon or affixed to because they have expired; and by
10 (3) their marking of products with "PATENTS PENDING" when no patents were
11 pending for such products.

12 2. Sukumar and SCSRA now bring this action pursuant to 35 U.S.C. §
13 292(b), which provides that any person may sue for civil penalties for false patent
14 marking.

15 **II. THE PARTIES**

16 3. Plaintiff Sukumar is an individual with a primary residence in Los
17 Angeles County, California.

18 4. Plaintiff SCSRA is a corporation organized and existing under the
19 laws of the State of California and having a principal place of business in Los
20 Angeles County, California.

21 5. Sukumar is the principal shareholder of SCSRA, and created SCSRA
22 as part of his dream of creating an integrative rehabilitation center for those
23 suffering from neuromuscular dystrophies.

24 6. Defendant Nautilus, Inc. is a corporation organized under the laws of
25 the State of Washington and has its principal place of business in Vancouver,
26 Washington. As explained below, Nautilus was previously known as Direct Focus,
27 Inc. In order to avoid confusion in this case, Plaintiffs will simply refer to this
28

1 defendant as "Nautilus," regardless of whether it was actually known as Direct
2 Focus, Inc. at the time of any particular allegation.

3
4 **III. JURISDICTION AND VENUE**

5 7. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§
6 1331 and 1338, and 35 U.S.C. § 292(b).

7 8. The Court has personal jurisdiction over Nautilus because it is a
8 corporation that is authorized to conduct, and does conduct, substantial business in
9 the State of California, has sufficient minimum contacts with California, and has
10 purposefully availed itself of the California market through the distribution,
11 advertising, and sale of its falsely marked products so as to render this Court's
12 exercise of jurisdiction permissible under traditional notions of fair play and
13 substantial justice.

14 9. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(c) and
15 1395(a).

16 10. The acts giving rise to this lawsuit, and resulting injuries to Sukumar
17 and SCSRA, also occurred within this district.

18 **IV. GENERAL ALLEGATIONS**

19 **A. NAUTILUS ACQUIRES AND ASSERTS ITS PATENTS TO**
20 **DETER COMPETITION.**

21 11. Nautilus is a sophisticated and experienced company when it comes to
22 acquiring, asserting, licensing and collateralizing patents.

23 12. Nautilus was founded in 1970. Very early in the life cycle of the
24 company, Nautilus recognized the importance of patents as a method of protecting
25 its market. Nautilus first applied for patents in the early 1970s and, by 1980, had
26 initiated its first patent litigation.
27
28

1 13. Since that time, Nautilus has amassed a large and complex patent
2 portfolio. By 2001, Nautilus held at least 41 U.S. patents and had applied for at
3 least 29 U.S. and international patents. By the end of 2008, Nautilus had expanded
4 its patent holdings with about 115 patents and trademarks and about 65 U.S. patent
5 and trademark applications pending. Currently, Nautilus holds about 200 patents
6 and trademarks, with about 40 applications pending in the United States.

7 14. Nautilus has consistently and clearly communicated its ability and
8 intent to assert its patents against its competitors. All of its recent Annual Reports
9 warn that Nautilus protects its "proprietary rights vigorously." (See 2006, 2007,
10 2008 and 2009 10-K filings).

11 15. And indeed, Nautilus has a long tradition of bringing patent suits
12 against its competitors. For instance, Nautilus, or its predecessor companies,
13 brought the following patent suits against its key competitors:

- 14 a. On October 16, 1980, Nautilus predecessor Arthur Jones (doing
15 business as Nautilus Sports/Medical Industries) sued the World
16 Fitness Center, Inc. and others for alleged patent infringement of
17 U.S. Patent Nos. 3,858,873 and 3,998,454¹ directed to, respectively,
18 a weight lifting exercise machine and a part for an exercise
19 machine. These patents expired on January 7, 1992 and December
20 21, 1993, respectively.
- 21 b. In November 1980, one month later, Arthur Jones also sued Ray W.
22 Fox, doing business as Carrollwood Fitness Center, for alleged
23 patent infringement of the same patents.
- 24 c. On November 5, 1993, Nautilus predecessor Nautilus International,
25 Inc. sued Body Masters Sports Industries, Inc. for alleged patent
26 infringement of U.S. Patent No. 4,478,411 directed to an apparatus

27 ¹ All of the patents cited herein are publicly available and are incorporated
28 by reference as if set forth in their entirety.

1 and a method for exercising the abductor or adductor muscles. This
2 patent expired on October 23, 2001.

3 d. On November 19, 1993, Nautilus International, Inc. sued Lumex,
4 Inc. for alleged patent infringement of U.S. Patent Nos. 4,456,245,
5 4,478,411, and 4,500,089 directed to, respectively, an apparatus and
6 a method for exercising torso rotation muscles, an apparatus and a
7 method for exercising the abductor or adductor muscles, and a
8 weight lifting machine for the lower back. These patents expired
9 on December 11, 2001, October 23, 2001, and January 20, 2003,
10 respectively.

11 e. On November 1, 2001, Nautilus sued Mad Dogg Athletics, Inc. for
12 alleged patent infringement of U.S. Patent No. 5,961,424 directed
13 to a clutch mechanism for use on exercise bicycles. This patent is
14 set to expire no later than August 28, 2017.

15 f. On August 1, 2002, Nautilus sued Precor, Inc. for alleged patent
16 infringement of U.S. Patent Nos. 5,242,343 and 5,383,829 directed
17 to a stationary exercise device for simulating running and stepping
18 motions. These patents are set to expire no later than September
19 30, 2012 and August 13, 2013, respectively.

20 g. On December 3, 2002, Nautilus sued Weider Health and Fitness,
21 Weider Nutrition International, Inc., Weider Nutrition Group, Inc.,
22 and Icon Health & Fitness, Inc. for alleged patent infringement of
23 U.S. Patent Nos. 4,620,704 and 4,725,057 directed to a rod-based
24 exercise machine. These patents expired no later than April 27,
25 2004 and November 3, 2006, respectively.

26 h. On December 22, 2006, Nautilus sued Keys Fitness Products, LP
27 for alleged patent infringement of U.S. Patent Nos. 5,961,424,
28 6,557,679, and 6,641,507 directed to a clutch mechanism for use on

exercise bicycles. These patents are set to expire no later than August 28, 2017, August 23, 2019, and August 23, 2019, respectively.

- i. On August 22, 2007, Nautilus sued I M&M Exercise Equipment, Inc., doing business as Extreme Fitness, for alleged patent infringement of U.S. Patent Nos. 6,422,979, 7,077,791, D528,173 S, and D528,611 S directed to, respectively, methods and apparatus for weight selection, and designs for an adjustable dumbbell base and an adjustable dumbbell. These patents are set to expire no later than April 27, 2019, April 18, 2022, November 12, 2020, and September 19, 2020, respectively.
- j. And on June 11, 2008, Nautilus sued Yongkang Star Fitness Equipment Co., Ltd., Yongkang Letwin Import & Export Co., Ltd., and Kelly Cheng for alleged patent infringement of U.S. Patent Nos. D540,405 S and D540,894 S directed to designs for adjustable dumbbells. These patents are set to expire no later than April 10, 2021 and April 17, 2021, respectively.

B. NAUTILUS IS FINED FOR FALSELY MARKING ITS PRODUCTS AS PATENTED

16. By the late 1990s, with many of its founding patents expiring, Nautilus had begun a campaign of falsely claiming that its products were patented when in fact they were not. For instance, by the late 1990s, Nautilus was systematically “marking” its products with patents that (1) never covered the products that they are marked upon or affixed to; and/or (2) do not cover the products that they are marked upon or affixed to because they were expired at the time of manufacture.

17. For instance, Nautilus “Prone Leg Curl” machines manufactured in 1999, as part of Nautilus’s 2ST product line, include a “patent marking” label affixed to the machine, which states that the product is “MANUFACTURED

1 UNDER U.S. PATENT NUMBERS AND OTHER PATENTS PENDING.” The
2 patent marking label includes at least three (3) patents that expired before 1999:
3 U.S. Patent Nos. 3,858,873; 3,998,454; and 4,257,592. These patents expired on
4 January 7, 1992, December 21, 1993, and November 29, 1998, respectively.
5 Further, the product is marked with patents that do not cover the product. The
6 purpose of the Prone Leg Curl is to exercise leg muscles. And yet, this product is
7 marked with U.S. Patent No. 3,998,454 which covers an invention for exercising
8 arm muscles; U.S. Patent Nos. 4,733,860 and 5,104,121 which cover inventions for
9 exercising torso muscles; and U.S. Patent No. 4,387,893 which covers an invention
10 for exercising abdominal muscles. Since at least two of these falsely marked
11 patents had previously been litigated by Nautilus, Nautilus was certainly aware of
12 when they expired and what they covered.

13 18. Nautilus is no stranger to deceptive advertisements. In 2005,
14 Nautilus’s deliberate conduct of falsely marking and advertising its products as
15 patented resulted in a jury verdict that Nautilus had falsely marked and advertised
16 its Bowflex machines for over a decade. *Icon Health & Fitness, Inc. v. Nautilus*
17 *Group, Inc.*, 2006 U.S. Dist. LEXIS 24153 (D. Utah Mar. 23, 2006). Nautilus’s
18 marketing materials used false statements indicating that its “Power Rods,” a core
19 component of the Bowflex machine, are patented or are manufactured with patented
20 technology. Nautilus also had claimed to be the developer and exclusive supplier
21 of poly-hexamethaline-adipamide, one of the most common forms of nylon, used in
22 its Bowflex Power Rods. The jury unanimously found that “Nautilus had promoted
23 an unpatented article . . . as patented and that Nautilus did so with the *purpose of*
24 *deceiving the public.*” *Id.* at *8 (emphasis added). For Nautilus’s false advertising
25 violations, the jury awarded damages in the amount of \$7,478,774.08, and the court
26 imposed the maximum penalty of \$325,000 for 650 separate false marking offenses.

C. NAUTILUS CONTINUES, UNABATED, TO FALSELY MARK ITS PRODUCTS EVEN AFTER AN AVERSIVE UNANIMOUS VERDICT IN THE ICON HEALTH SUIT.

19. Undeterred, Nautilus continued to falsely mark its products in spite of the Icon Health suit. From 2006, just as the Icon Health suit was concluding, to today, Nautilus falsely marked multiple lines of products, including its elliptical trainers, StairMaster products and its Nitro, Nitro Plus, Studio, F2, XPLoad and Nautilus One product lines. For instance:

- a. The 2006 Nitro Plus models of Biceps Curl, Lower Back, Abdominal, Leg Extension, Seated Leg Curl, Gravitron Chin/Dip, Hip Abduction/Hip Adduction, Rear Delt/Pec Fly, Incline Press, Overhead Press, Vertical Chest, Lateral Raise, Pullover, and Triceps Extension are all falsely marked with at least 12 expired patents. Furthermore, they are falsely marked with patents unrelated to the products upon which the patent markings are affixed, such as U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means, and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.
- b. The 2006 models of Nautilus Commercial Series elliptical trainers, E916 and EV916, and StairMaster StepMill 7000PT trainers, are all falsely marked with at least 4 expired patents. Furthermore, they are falsely marked with patents that do not cover the products to which they are affixed, such as U.S. Patent No. 5,312,313, directed to an exerciser for chin-ups and dips, U.S. Patent No. 5,380,258, directed to a rope climbing apparatus, and U.S. Patent No. D

357,956, directed to a design for a weight machine for use from a wheelchair.

- c. The 2007 models of Nitro Plus Seated Dip, Nautilus One Biceps Curl, Nitro Pec Fly, XPLoad Seated Dip, Nitro V-Triceps Extension, Nitro Biceps Curl, and XPLoad Overhead are all falsely marked with at least 14 expired patents. Furthermore, they are falsely marked with patents that do not cover the products to which they are affixed, such as U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means, and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.
- d. The 2008 models of XPLoad Lat Pulldown, Studio Compound Row, Studio Pec Fly, Nitro Plus Compound Row, XPLoad Compound Row, Studio Lat Pulldown, F2 Lat Pulldown, and Studio Seated Leg Curl are all falsely marked with at least 14 expired patents. Furthermore, they are falsely marked with patents that do not cover the products to which they are affixed, such as U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means, and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.
- e. The 2009 models of Nitro Plus Seated Calf, Nautilus One Seated Leg Curl, and Nautilus One Pec Fly are all falsely marked with at least 14 expired patents. Furthermore, they are falsely marked with patents that do not cover the products to which they are affixed,

1 such as U.S. Patent No. 4,257,592, directed to an exercising
2 apparatus with handle, rope, and clamping means, and U.S. Patent
3 No. 4,493,485, directed to an exercising apparatus and a method
4 which monitor and display physical effort exerted by an exercising
5 person and correlate that monitored effort exerted to a programmed
6 standard.

7 20. In addition to Nautilus's abject disregard for the adverse verdicts
8 regarding its false marking practices, Nautilus's motive to persevere in its
9 deceptive, reckless and illegal conduct can be seen from Nautilus SEC filings,
10 which clearly discuss how the expiration and limited scope of Nautilus's patents
11 were threatening Nautilus's ability to compete in the market:

- 12 • "Protecting our intellectual property is an important factor in maintaining
13 our competitive position in the fitness and mattress industries. **If we do**
14 **not or are unable to adequately protect our intellectual property, our**
15 **sales and profitability could be adversely affected.**" (April 13, 1999
16 Nautilus Form S-1/A, *available at*
17 <http://investors.nautilusinc.com/sec.cfm>) (emphasis added).
- 18 • "We believe all patents are important to our strategy. . . . The expiration
19 of our patents could trigger the introduction of similar products by
20 competitors." (March 15, 2004 10-K, *available at*
21 <http://investors.nautilusinc.com/sec.cfm>).

22 **D. SUKUMAR AND SCSRA SUFFER COMPETITIVE INJURY AS**
23 **THEY ATTEMPT TO DESIGN REHABILITATION**
24 **EQUIPMENT WHILE RESPECTING THE NAUTILUS**
25 **PATENT PORTFOLIO.**

26 21. In 1994, Sukumar's father suffered a debilitating neurovascular event.
27
28

22. In accordance with Sukumar's culturally-rooted dedication to his parents, he made the rehabilitation of his father his utmost and single most important priority. Sukumar adopted an integrative approach to his father's rehabilitation. This approach included the use of specialized medical rehabilitation machines, among other treatment modalities. Using Sukumar's rehabilitation protocol, his father regained more of his mental and physical functionality than his doctors thought possible and lived significantly longer than his doctors thought possible.²

23. In connection with his father's care, Sukumar absorbed himself in the study of physical rehabilitation and the search for new and improved ways to assist elderly patients like his father. Through this process, Sukumar gained a deep understanding of the rehabilitation needs of the elderly. He came to recognize the fast-growing demographic in the United States of 50+ year olds who would benefit from an integrative approach to rehabilitation. Through his experiences in caring for his father, Sukumar came to believe that a specific, specialized, customized, equipment-based protocol could be used to help other elderly patients like his father make better and more meaningful progress in rehabilitation.

24. In 2004, Sukumar formed SCSRA to help him realize his dream to use an integrative equipment-based protocol to help those who, like his father, suffered from any number of neuromuscular dystrophies. In addition to the benefit it would provide for its patients, Sukumar also believed that SCSRA would generate profits for himself. All of SCSRA's activities including the acquisition of Nautilus equipment as alleged herein were centered in Southern California and SCSRA owns a substantial amount of falsely marked Nautilus equipment which is located in the Central District of California.

² Sukumar's father, Ponani Narayanan, lived approximately 10 years beyond the lifespan predicted by his primary care physicians.

1 25. Sukumar intended for SCSRA to offer "traditional" physical
2 rehabilitation as a fundamental component of its rehabilitation program in addition
3 to other treatment modalities, including diet and mental and spiritual wellness.

4 26. Sukumar searched for cardiovascular, stretching, and strength training
5 exercise machines that he could use with those in need of rehabilitation. In
6 particular, he sought a multi-station solution which utilized known resistance-to-
7 user principles in conjunction with weight increments as small as one pound. Such
8 features were important to Sukumar, inasmuch as the equipment's design would
9 allow medical specialists and licensed therapists to create and "fine-tune" clients'
10 treatment plans to meet their individual and changing abilities. Also, the precise
11 and low-weight resistance-to-user feature was important as it would permit injured,
12 as well as frail elderly clients with limited physical strength, to utilize the machines
13 at low, incremental resistance levels. Otherwise, these clients would be excluded
14 from benefiting from traditional rehabilitation machines. Sukumar also searched
15 for machines that would protect compromised clients from injuries caused by the
16 mere act of using such equipment. He was intent upon finding and/or developing
17 machines that incorporated safety features such as weight shields, soft top stops to
18 limit motion range, and various breakaway features to ensure that users of the
19 machines would not inadvertently injure themselves during the rehabilitation
20 process.

21 27. After conducting an extensive search, Sukumar determined that the
22 marketplace did not offer an "off-the-shelf," medical grade product that would meet
23 all of his needs for rehabilitating his father and those like him. After an exhaustive
24 search, Sukumar concluded that machines manufactured by Nautilus were best-
25 suited for rehabilitation but they, too, needed modifications to meet the needs of the
26 rehabilitation protocol he had developed for the elderly.

27 28. Sukumar believed that he could make the design modifications that his
28 target demographic would need. In addition to holding an MBA from the Wharton

1 School of Business at the University of Pennsylvania, Sukumar holds equivalent
2 Bachelor of Science degrees from India and the United Kingdom in mechanical,
3 electrical, and rail traction technology engineering that he believed provided him
4 with the knowledge he needed to re-design, retrofit and modify Nautilus's exercise
5 machines to serve his target demographic's needs.

6 29. Sukumar was aware that various Nautilus technologies were patented
7 and that Nautilus owned an extensive patent portfolio. Patent markings on Nautilus
8 equipment that Sukumar had examined included patent-marking labels, or plaques,
9 each including a large number of patent numbers. Sukumar concluded the
10 technology he sought for rehabilitation was heavily protected by Nautilus patents.
11 Sukumar doubted that he was capable of designing around so many patents to
12 create machines that satisfied his goals but did not infringe Nautilus's patent rights.
13 Thus, Sukumar concluded that Nautilus was the best and perhaps only source of the
14 technology he sought for rehabilitation. So, he paid Nautilus more than \$150,000
15 to manufacture custom machines that implemented Sukumar's designs.

16 30. The customized equipment that Sukumar paid Nautilus to manufacture
17 for him did not meet his expectations or the needs of SCSRA. So, with no alternate
18 source, Sukumar (both individually and through SCSRA) was forced to sue
19 Nautilus multiple times, at great cost, to attempt to get Nautilus to provide
20 machines that comply with Sukumar's design and fit and finish specifications. This
21 litigation has gone on for years, and throughout the entire time, Sukumar has
22 maintained his desire to specially design exercise equipment for SCSRA.
23 However, he has continued to be intimidated and deterred from doing so by the
24 patent markings on equipment manufactured by Nautilus. If not for these false and
25 misleading patent markings, Sukumar would have attempted to design and build, or
26 retained someone to design and build, machines that suited his needs. Nautilus's
27 misleading patent markings caused Sukumar and SCSRA to suffer competitive
28 injuries, in part because Sukumar came to believe that Nautilus patents precluded

1 him and SCSRA from manufacturing rehabilitation equipment or modifying
2 Nautilus equipment so that it could be used in rehabilitation. Sukumar and SCSRA
3 concluded that Nautilus was the only source of suitable technology. Sukumar then
4 pursued a variety of legal strategies, including protracted litigation and attempts to
5 purchase and/or license the intellectual property patents he believed to be valid, in
6 order to legally have access to the technology he believed necessary to bring his
7 rehabilitation protocol to market.

8 31. On multiple occasions, Sukumar has attempted to license patents from
9 Nautilus so that he could modify and design exercise equipment without potentially
10 infringing Nautilus's patent rights. For instance, in July of 2004, Sukumar, through
11 his lawyers, communicated to Nautilus that he was interested in acquiring a license
12 to use some of their patents. When this did not go anywhere, Sukumar again raised
13 this issue in an August 17, 2009 letter from his lawyers at Jones Day to Nautilus's
14 lawyers. In that letter Sukumar proposed a deal pursuant to which he would acquire
15 a license under the Nautilus patents and patent applications to make and have made
16 for use exclusively in Sukumar-owned rehabilitation centers equipment and parts
17 that are covered by a claim of Nautilus's patent rights. Nautilus did not respond to
18 this proposal.

19 32. Sukumar's ongoing belief that he needed a license from Nautilus
20 because Nautilus's vast patent portfolio precluded him from designing and building
21 the machines that SCSRA desired was fueled by the fact that Sukumar was
22 informed that Nautilus was using its patent portfolio as collateral for a massive line
23 of credit that it obtained through Bank of America. Sukumar has subsequently
24 learned that the amount of this line of credit was \$100,000,000. Sukumar
25 reasonably believed that if Nautilus, in its capacity as a publicly traded company,
26 proffered its patent-related intellectual property portfolio as collateral to a federally
27 regulated banking institution, then Nautilus's patents must be legitimate and valid
28

1 and must cover Nautilus technology in the manner represented by Nautilus on its
2 commercial products.

3 33. Sukumar has only recently learned that the patents identified on the
4 sought-after Nautilus products include many patents that are expired or do not
5 cover the products that they are marked on.

6 **V. FIRST CAUSE OF ACTION: FALSE MARKING UNDER 35 U.S.C. §**
7 **292**

8 34. Sukumar and SCSRA re-allege and incorporate by reference herein the
9 allegations of the preceding and foregoing paragraphs.

10 35. Plaintiffs have suffered competitive injuries and bring this false
11 marking claim under the patent laws of the United States, 35. U.S.C. § 292.

12 36. A false marking claim is a qui tam claim, which means that Plaintiffs
13 bring the claim on behalf of the U.S. government as well as themselves. The statute
14 provides:

15 “Whoever marks upon, or affixes to, or uses in advertising in
16 connection with any unpatented article, the word “patent” or any word
17 or number importing that the same is patented for the purpose of
18 deceiving the public . . . [s]hall be fined not more than \$500 for every
19 such offense.”

20 37. In 2005, the Federal Circuit defined the term “unpatented article” as
21 follows:

22 “When the statute refers to an ‘unpatented article’ the statute means
23 that the article in question is not covered by at least one claim of each
24 patent with which the article is marked.”

25 *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1352 (Fed. Cir. 2005)
26 (emphasis added).
27
28

1 38. The Federal Circuit has also explained that “articles marked with
2 expired patent numbers are falsely marked.” *Pequignot v. Solo Cup Co.*, 608 F.3d
3 1356, 1362 (Fed. Cir. 2010).

4
5 **A. NAUTILUS HAS FALSELY MARKED EQUIPMENT WITH**
6 **PATENTS THAT DO NOT COVER THE MARKED**
7 **EQUIPMENT AND WITH EXPIRED PATENTS.**

8 39. Throughout the past decade, and within the past five years, Nautilus
9 has marked exercise equipment with patent numbers that (1) never covered the
10 products that they are marked upon or affixed to; and/or (2) do not cover the
11 products that they are marked upon or affixed to because they have expired.
12 Additionally, Nautilus has marked products with “PATENTS PENDING,” when in
13 fact, upon information and belief, many of the Nautilus products marked do not
14 have any such patents pending.

15 40. Nautilus typically “marks” its machines by affixing -- either
16 adhesively or mechanically -- a “patent marking” label to the machine. The patent
17 marking labels affixed to Nautilus machines typically include a statement that the
18 product is “MANUFACTURED UNDER U.S. PATENT NUMBERS AND
19 OTHER PATENTS PENDING,” followed by a listing of U.S. patent numbers.
20 Many Nautilus machines sold by Nautilus in the last five years were falsely marked
21 in that the patent marking label affixed to the machine includes patents that simply
22 do not cover the machine and/or patents that were expired at the time of sale. Some
23 expired patents marked on the subject machines had been invalid for as long as 16
24 years.

25 41. Since 2006, Nautilus has demonstrably falsely marked at least the
26 following Nautilus product lines: Nautilus elliptical trainers, StairMaster products
27 and Nautilus’s Nitro, Nitro Plus, Studio, F2, XPLoad and Nautilus One product
28 lines.

1 42. For instance, Nautilus has falsely marked at least the 2006 versions of
2 the Nitro Plus Biceps Curl, Lower Back, Abdominal, Leg Extension, Seated Leg
3 Curl, Gravitron Chin/Dip, Hip Abduction/Hip Adduction, Rear Delt/Pec Fly,
4 Incline Press, Overhead Press, Vertical Chest, Lateral Raise, Pullover, and Triceps
5 Extension. Each includes a patent marking label that is affixed to the product that
6 includes the following language: "MANUFACTURED UNDER U.S. PATENT
7 NUMBERS AND OTHER PATENTS PENDING," followed by a listing of 24
8 patents, a substantial number of which are expired or do not contain any claims that
9 cover the product. Specifically:

- 10 a. 2006 Nitro Plus Biceps Curl is falsely marked with at least twelve
11 (12) patents that had expired before the product was manufactured
12 and at least two (2) patents that do not cover the product. Expired
13 patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;
14 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
15 4,511,137; 4,589,656; 4,600,196; and 4,666,152. Patents marked
16 on the machine which do not cover the machine include, at least,
17 U.S. Patent No. 4,257,592, directed to an exercising apparatus with
18 handle, rope, and clamping means; and U.S. Patent No. 4,493,485,
19 directed to an exercising apparatus and a method which monitor
20 and display physical effort exerted by an exercising person and
21 correlate that monitored effort exerted to a programmed standard.
- 22 b. 2006 Nitro Plus Lower Back is falsely marked with at least twelve
23 (12) patents that had expired before the product was manufactured
24 and at least two (2) patents that do not cover the product. Expired
25 patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;
26 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
27 4,511,137; 4,589,656; 4,600,196; and 4,666,152. Patents marked
28 on the machine which do not cover the machine include, at least,

U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means; and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.

- c. 2006 Nitro Plus Abdominal is falsely marked with at least twelve (12) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; and 4,666,152. Patents marked on the machine which do not cover the machine include, at least, U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means; and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.
- d. 2006 Nitro Plus Leg Extension is falsely marked with at least twelve (12) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; and 4,666,152. Patents marked on the machine which do not cover the machine include, at least, U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means; and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an

exercising person and correlate that monitored effort exerted to a programmed standard.

e. 2006 Nitro Plus Seated Leg Curl is falsely marked with at least twelve (12) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; and 4,666,152. Patents marked on the machine which do not cover the machine include, at least, U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means; and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.

f. 2006 Nitro Plus Gravitron Chin/Dip is falsely marked with at least twelve (12) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; and 4,666,152. Patents marked on the machine which do not cover the machine include, at least, U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means; and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.

1 g. 2006 Nitro Plus Hip Abduction/Hip Adduction is falsely marked
2 with at least twelve (12) patents that had expired before the product
3 was manufactured and at least two (2) patents that do not cover the
4 product. Expired patents include, at least, U.S. Patent Nos.
5 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411;
6 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; and
7 4,666,152. Patents marked on the machine which do not cover the
8 machine include, at least, U.S. Patent No. 4,257,592, directed to an
9 exercising apparatus with handle, rope, and clamping means; and
10 U.S. Patent No. 4,493,485, directed to an exercising apparatus and
11 a method which monitor and display physical effort exerted by an
12 exercising person and correlate that monitored effort exerted to a
13 programmed standard.

14 h. 2006 Nitro Plus Rear Delt/Pec Fly is falsely marked with at least
15 twelve (12) patents that had expired before the product was
16 manufactured and at least two (2) patents that do not cover the
17 product. Expired patents, at least, include U.S. Patent Nos.
18 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411;
19 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; and
20 4,666,152. Patents marked on the machine which do not cover the
21 machine include, at least, U.S. Patent No. 4,257,592, directed to an
22 exercising apparatus with handle, rope, and clamping means; and
23 U.S. Patent No. 4,493,485, directed to an exercising apparatus and
24 a method which monitor and display physical effort exerted by an
25 exercising person and correlate that monitored effort exerted to a
26 programmed standard.

27 i. 2006 Nitro Plus Incline Press is falsely marked with at least twelve
28 (12) patents that had expired before the product was manufactured

1 and at least two (2) patents that do not cover the product. Expired
2 patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;
3 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
4 4,511,137; 4,589,656; 4,600,196; and 4,666,152. Patents marked
5 on the machine which do not cover the machine include, at least,
6 U.S. Patent No. 4,257,592, directed to an exercising apparatus with
7 handle, rope, and clamping means; and U.S. Patent No. 4,493,485,
8 directed to an exercising apparatus and a method which monitor
9 and display physical effort exerted by an exercising person and
10 correlate that monitored effort exerted to a programmed standard.

11 j. 2006 Nitro Plus Overhead Press is falsely marked with at least
12 twelve (12) patents that had expired before the product was
13 manufactured and at least two (2) patents that do not cover the
14 product. Expired patents include, at least, U.S. Patent Nos.
15 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411;
16 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; and
17 4,666,152. Patents marked on the machine which do not cover the
18 machine include, at least, U.S. Patent No. 4,257,592, directed to an
19 exercising apparatus with handle, rope, and clamping means; and
20 U.S. Patent No. 4,493,485, directed to an exercising apparatus and
21 a method which monitor and display physical effort exerted by an
22 exercising person and correlate that monitored effort exerted to a
23 programmed standard.

24 k. 2006 Nitro Plus Vertical Chest is falsely marked with at least
25 twelve (12) patents that had expired before the product was
26 manufactured and at least two (2) patents that do not cover the
27 product. Expired patents include, at least, U.S. Patent Nos.
28 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411;

4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; and
4,666,152. Patents marked on the machine which do not cover the
machine include, at least, U.S. Patent No. 4,257,592, directed to an
exercising apparatus with handle, rope, and clamping means; and
U.S. Patent No. 4,493,485, directed to an exercising apparatus and
a method which monitor and display physical effort exerted by an
exercising person and correlate that monitored effort exerted to a
programmed standard.

1. 2006 Nitro Plus Lateral Raise is falsely marked with at least twelve
(12) patents that had expired before the product was manufactured
and at least two (2) patents that do not cover the product. Expired
patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;
4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
4,511,137; 4,589,656; 4,600,196; and 4,666,152. Patents marked
on the machine which do not cover the machine include, at least,
U.S. Patent No. 4,257,592, directed to an exercising apparatus with
handle, rope, and clamping means; and U.S. Patent No. 4,493,485,
directed to an exercising apparatus and a method which monitor
and display physical effort exerted by an exercising person and
correlate that monitored effort exerted to a programmed standard.
- m. 2006 Nitro Plus Pullover is falsely marked with at least twelve (12)
patents that had expired before the product was manufactured and
at least two (2) patents that do not cover the product. Expired
patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;
4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
4,511,137; 4,589,656; 4,600,196; and 4,666,152. Patents marked
on the machine which do not cover the machine include, at least,
U.S. Patent No. 4,257,592, directed to an exercising apparatus with

1 handle, rope, and clamping means; and U.S. Patent No. 4,493,485,
2 directed to an exercising apparatus and a method which monitor
3 and display physical effort exerted by an exercising person and
4 correlate that monitored effort exerted to a programmed standard.

5 n. 2006 Nitro Plus Triceps Extension is falsely marked with at least
6 twelve (12) patents that had expired before the product was
7 manufactured and at least two (2) patents that do not cover the
8 product. Expired patents include, at least, U.S. Patent Nos.
9 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411;
10 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; and
11 4,666,152. Patents marked on the machine which do not cover the
12 machine include, at least, U.S. Patent No. 4,257,592, directed to an
13 exercising apparatus with handle, rope, and clamping means; and
14 U.S. Patent No. 4,493,485, directed to an exercising apparatus and
15 a method which monitor and display physical effort exerted by an
16 exercising person and correlate that monitored effort exerted to a
17 programmed standard.

18 43. Nautilus has also falsely marked at least the 2006 versions of the
19 StairMaster StepMill 7000PT trainer, and Nautilus Commercial Series E916 and
20 EV916 elliptical trainers. Each includes a patent marking label that is affixed to the
21 product that includes the following language: "MANUFACTURED UNDER U.S.
22 PATENT NUMBERS AND OTHER PATENTS PENDING," followed by a listing
23 of 16 patents, a substantial number of which are expired or do not contain any
24 claims that cover the product. Specifically:

25 a. 2006 StairMaster StepMill 7000PT trainer is falsely marked with at
26 least four (4) patents that had expired before the product was
27 manufactured and at least three (3) patents that do not cover the
28 product. Expired patents include, at least, U.S. Patent Nos.

1 4,687,195; 5,060,938; 5,290,205; and 5,380,258. Patents marked
2 on the machine which do not cover the machine include, at least,
3 U.S. Patent No. 5,312,313, directed to an exerciser for chin-ups and
4 dips; U.S. Patent No. 5,380,258, directed to a rope climbing
5 apparatus; and U.S. Patent No. D 357,956, directed to a design for a
6 weight machine for use from a wheelchair.

7 b. 2006 Nautilus Commercial Series E916 Elliptical is falsely marked
8 with at least four (4) patents that had expired before the product
9 was manufactured and at least three (3) patents that do not cover
10 the product. Expired patents include, at least, U.S. Patent Nos.
11 4,687,195; 5,060,938; 5,290,205; and 5,380,258. Patents marked
12 on the machine which do not cover the machine include, at least,
13 U.S. Patent No. 5,312,313, directed to an exerciser for chin-ups and
14 dips; U.S. Patent No. 5,380,258, directed to a rope climbing
15 apparatus; and U.S. Patent No. D 357,956, directed to a design for a
16 weight machine for use from a wheelchair.

17 c. 2006 Nautilus Commercial Series EV916 Elliptical is falsely
18 marked with at least four (4) patents that had expired before the
19 product was manufactured and at least three (3) patents that do not
20 cover the product. Expired patents include, at least, U.S. Patent
21 Nos. 4,687,195; 5,060,938; 5,290,205; and 5,380,258. Patents
22 marked on the machine which do not cover the machine include, at
23 least, U.S. Patent No. 5,312,313, directed to an exerciser for chin-
24 ups and dips; U.S. Patent No. 5,380,258, directed to a rope
25 climbing apparatus; and U.S. Patent No. D 357,956, directed to a
26 design for a weight machine for use from a wheelchair.

27 44. Nautilus has also falsely marked at least the 2007 models of Nitro Plus
28 Seated Dip, Nautilus One Biceps Curl, Nitro Pec Fly, XPLoad Seated Dip, Nitro V-

1 Triceps Extension, Nitro Plus Biceps Curl, and XPLoad Overhead Press. Each
2 includes a patent marking label that is affixed to the product that includes the
3 following language: "MANUFACTURED UNDER U.S. PATENT NUMBERS
4 AND OTHER PATENTS PENDING," followed by a listing of 24 patents, a
5 substantial number of which are expired or do not contain any claims that cover the
6 product. Specifically:

7 a. 2007 Nitro Plus Seated Dip is falsely marked with at least fourteen
8 (14) patents that had expired before the product was manufactured
9 and at least two (2) patents that do not cover the product. Expired
10 patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;
11 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
12 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and
13 5,810,696. Patents marked on the machine which do not cover the
14 machine include, at least, U.S. Patent No. 4,257,592, directed to an
15 exercising apparatus with handle, rope, and clamping means; and
16 U.S. Patent No. 4,493,485, directed to an exercising apparatus and a
17 method which monitor and display physical effort exerted by an
18 exercising person and correlate that monitored effort exerted to a
19 programmed standard.

20 b. 2007 Nautilus One Biceps Curl is falsely marked with at least
21 fourteen (14) patents that had expired before the product was
22 manufactured and at least two (2) patents that do not cover the
23 product. Expired patents include, at least, U.S. Patent Nos.
24 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411;
25 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; 4,666,152;
26 4,733,860; and 5,810,696. Patents marked on the machine which
27 do not cover the machine include, at least, U.S. Patent No.
28 4,257,592, directed to an exercising apparatus with handle, rope,

1 and clamping means; and U.S. Patent No. 4,493,485, directed to an
2 exercising apparatus and a method which monitor and display
3 physical effort exerted by an exercising person and correlate that
4 monitored effort exerted to a programmed standard.

5 c. 2007 Nitro Pec Fly is falsely marked with at least fourteen (14)
6 patents that had expired before the product was manufactured and
7 at least two (2) patents that do not cover the product. Expired
8 patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;
9 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
10 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and
11 5,810,696. Patents marked on the machine which do not cover the
12 machine include, at least, U.S. Patent No. 4,257,592, directed to an
13 exercising apparatus with handle, rope, and clamping means; and
14 U.S. Patent No. 4,493,485, directed to an exercising apparatus and a
15 method which monitor and display physical effort exerted by an
16 exercising person and correlate that monitored effort exerted to a
17 programmed standard.

18 d. 2007 XPLoad Seated Dip is falsely marked with at least fourteen
19 (14) patents that had expired before the product was manufactured
20 and at least two (2) patents that do not cover the product. Expired
21 patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;
22 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
23 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and
24 5,810,696. Patents marked on the machine which do not cover the
25 machine include, at least, U.S. Patent No. 4,257,592, directed to an
26 exercising apparatus with handle, rope, and clamping means; and
27 U.S. Patent No. 4,493,485, directed to an exercising apparatus and a
28 method which monitor and display physical effort exerted by an

exercising person and correlate that monitored effort exerted to a programmed standard.

- e. 2007 Nitro V-Triceps Extension is falsely marked with at least fourteen (14) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and 5,810,696. Patents marked on the machine which do not cover the machine include, at least, U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means; and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.
- f. 2007 Nitro Plus Biceps Curl is falsely marked with at least fourteen (14) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and 5,810,696. Patents marked on the machine which do not cover the machine include, at least, U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means; and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.

g. 2007 XPLoad Overhead Press is falsely marked with at least fourteen (14) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and 5,810,696. Patents marked on the machine which do not cover the machine include, at least, U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means; and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.

45. Nautilus has also falsely marked at least the 2008 models of XPLoad Lat Pulldown, Studio Compound Row, Studio Pec Fly, Nitro Plus Compound Row, XPLoad Compound Row, Studio Lat Pulldown, F2 Lat Pulldown, and Studio Seated Leg Curl. Each includes a patent marking label that is affixed to the product that includes the following language: "MANUFACTURED UNDER U.S. PATENT NUMBERS AND OTHER PATENTS PENDING," followed by a listing of 24 patents, a substantial number of which are expired or do not contain any claims that cover the product. Specifically:

a. 2008 XPLoad Lat Pulldown is falsely marked with at least fourteen (14) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and 5,810,696. Patents marked on the machine which do not cover the

1 machine include, at least, U.S. Patent No. 4,257,592, directed to an
2 exercising apparatus with handle, rope, and clamping means; and
3 U.S. Patent No. 4,493,485, directed to an exercising apparatus and a
4 method which monitor and display physical effort exerted by an
5 exercising person and correlate that monitored effort exerted to a
6 programmed standard.

- 7 b. 2008 Studio Compound Row is falsely marked with at least
8 fourteen (14) patents that had expired before the product was
9 manufactured and at least two (2) patents that do not cover the
10 product. Expired patents include, at least, U.S. Patent Nos.
11 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411;
12 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; 4,666,152;
13 4,733,860; and 5,810,696. Patents marked on the machine which
14 do not cover the machine include, at least, U.S. Patent No.
15 4,257,592, directed to an exercising apparatus with handle, rope,
16 and clamping means; and U.S. Patent No. 4,493,485, directed to an
17 exercising apparatus and a method which monitor and display
18 physical effort exerted by an exercising person and correlate that
19 monitored effort exerted to a programmed standard.
- 20 c. 2008 Studio Pec Fly is falsely marked with at least fourteen (14)
21 patents that had expired before the product was manufactured and
22 at least two (2) patents that do not cover the product. Expired
23 patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;
24 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
25 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and
26 5,810,696. Patents marked on the machine which do not cover the
27 machine include, at least, U.S. Patent No. 4,257,592, directed to an
28 exercising apparatus with handle, rope, and clamping means; and

U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.

- d. 2008 Nitro Plus Compound Row is falsely marked with at least fourteen (14) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and 5,810,696. Patents marked on the machine which do not cover the machine include, at least, U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means; and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.
- e. 2008 XPLoad Compound Row is falsely marked with at least fourteen (14) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860.
- f. 2008 Studio Lat Pulldown is falsely marked with at least fourteen (14) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;

1 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
2 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and
3 5,810,696. Patents marked on the machine which do not cover the
4 machine include, at least, U.S. Patent No. 4,257,592, directed to an
5 exercising apparatus with handle, rope, and clamping means; and
6 U.S. Patent No. 4,493,485, directed to an exercising apparatus and a
7 method which monitor and display physical effort exerted by an
8 exercising person and correlate that monitored effort exerted to a
9 programmed standard.

10 g. 2008 F2 Lat Pulldown is falsely marked with at least fourteen (14)
11 patents that had expired before the product was manufactured and
12 at least two (2) patents that do not cover the product. Expired
13 patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;
14 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
15 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and
16 5,810,696. Patents marked on the machine which do not cover the
17 machine include, at least, U.S. Patent No. 4,257,592, directed to an
18 exercising apparatus with handle, rope, and clamping means; and
19 U.S. Patent No. 4,493,485, directed to an exercising apparatus and a
20 method which monitor and display physical effort exerted by an
21 exercising person and correlate that monitored effort exerted to a
22 programmed standard.

23 h. 2008 Studio Seated Leg Curl is falsely marked with at least
24 fourteen (14) patents that had expired before the product was
25 manufactured and at least two (2) patents that do not cover the
26 product. Expired patents include, at least, U.S. Patent Nos.
27 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411;
28 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; 4,666,152;

1 4,733,860; and 5,810,696. Patents marked on the machine which
2 do not cover the machine include, at least, U.S. Patent No.
3 4,257,592, directed to an exercising apparatus with handle, rope,
4 and clamping means; and U.S. Patent No. 4,493,485, directed to an
5 exercising apparatus and a method which monitor and display
6 physical effort exerted by an exercising person and correlate that
7 monitored effort exerted to a programmed standard.

8 46. Nautilus has also falsely marked at least the 2009 models of Nitro Plus
9 Seated Calf, Nautilus One Seated Leg Curl, and Nautilus One Pec Fly. Each
10 includes a patent marking label that is affixed to the product that includes the
11 following language: "MANUFACTURED UNDER U.S. PATENT NUMBERS
12 AND OTHER PATENTS PENDING," followed by a listing of 24 patents, a
13 substantial number of which are expired or do not contain any claims that cover the
14 product. Specifically:

- 15 a. 2009 Nitro Plus Seated Calf is falsely marked with at least fourteen
16 (14) patents that had expired before the product was manufactured
17 and at least two (2) patents that do not cover the product. Expired
18 patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454;
19 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089;
20 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and
21 5,810,696. Patents marked on the machine which do not cover the
22 machine include, at least, U.S. Patent No. 4,257,592, directed to an
23 exercising apparatus with handle, rope, and clamping means; and
24 U.S. Patent No. 4,493,485, directed to an exercising apparatus and a
25 method which monitor and display physical effort exerted by an
26 exercising person and correlate that monitored effort exerted to a
27 programmed standard.

- b. 2009 Nautilus One Seated Leg Curl is falsely marked with at least fourteen (14) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and 5,810,696. Patents marked on the machine which do not cover the machine include, at least, U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means; and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.
- c. 2009 Nautilus One Pec Fly is falsely marked with at least fourteen (14) patents that had expired before the product was manufactured and at least two (2) patents that do not cover the product. Expired patents include, at least, U.S. Patent Nos. 3,858,873; 3,998,454; 4,257,592; 4,387,893; 4,456,245; 4,478,411; 4,493,485; 4,500,089; 4,511,137; 4,589,656; 4,600,196; 4,666,152; 4,733,860; and 5,810,696. Patents marked on the machine which do not cover the machine include, at least, U.S. Patent No. 4,257,592, directed to an exercising apparatus with handle, rope, and clamping means; and U.S. Patent No. 4,493,485, directed to an exercising apparatus and a method which monitor and display physical effort exerted by an exercising person and correlate that monitored effort exerted to a programmed standard.

47. Nautilus, throughout the relevant time period, has sold a large variety of products under at least the following brands: Bowflex, Nautilus, Schwinn

1 Fitness, StairMaster, Trimline and Universal. Products sold by Nautilus under its
2 brands include, at least, home gyms, free weights, benches, treadmills,
3 treadclimbers, cycling equipment, steppers, elliptical trainers, fitness accessories,
4 and sleep systems. On information and belief, Nautilus's pattern of false marking
5 is pervasive and extends to many, if not all, of the foregoing Nautilus products and
6 brands.

7
8 **B. NAUTILUS FALSELY MARKED ITS PRODUCTS WITH AN**
9 **INTENT TO DECEIVE THE PUBLIC, ITS COMPETITORS**
10 **AND WOULD-BE DEVELOPERS OF RELATED MACHINE**
11 **DESIGNS.**

12 48. The publicly available facts demonstrate that Nautilus falsely marked
13 its products with an intent to deceive the public, its competitors and would-be
14 developers of related machine designs. As explained below, Nautilus has a long
15 history of falsely marking its products and has been fined for doing so. In addition,
16 Nautilus's frequent use of protective litigation of its patents demonstrates that it
17 knows what its patents cover and when they expire. Furthermore, Nautilus's
18 transactions dealing with its patents, such as loan collateralization, patent
19 acquisitions, patent assignments, and payment/non-payment of maintenance fees
20 demonstrate that Nautilus knows what its patents cover and when they expire.
21 Nautilus's intent to deceive the public, its competitors and would-be developers of
22 related machine designs by false marking can also be inferred from its knowledge
23 regarding the scope and expiration of its patents and its repeated assertions that its
24 patents are vital to its ability to compete in and dominate the marketplace. As the
25 Federal Circuit has held, "the fact of misrepresentation coupled with proof that the
26 party making it had knowledge of its falsity is enough to warrant drawing the
27 inference that there was a fraudulent intent." *Clontech Labs., Inc. v. Invitrogen*
28 *Corp.*, 406 F.3d 1347, 1352 (Fed. Cir. 2005) (internal quotations omitted). Further,

1 “the inference of intent to deceive cannot be defeated with blind assertions of good
2 faith where the patentee has knowledge of mismarking.” *Id.*, at 1353, n.2.

3 **1. Nautilus is well aware of the false marking statute and has a**
4 **long history of falsely marking its products.**

5 49. In 2006, as described above, Nautilus was fined \$325,000 under
6 35 U.S.C. § 292 for false marking violations for over a decade regarding its
7 Bowflex machines. *Icon Health & Fitness, Inc. v. Nautilus Group, Inc.*, 2006 U.S.
8 Dist. LEXIS 24153 (D. Utah Mar. 23, 2006). Nautilus intentionally misled the
9 public, its competitors and would-be developers of related machine designs by
10 using false statements indicating that its “Power Rods,” a core component of the
11 Bowflex machine, are patented or are manufactured with patented technology. The
12 Icon jury unanimously found that “Nautilus had promoted an unpatented article . . .
13 as patented and that Nautilus did so with the *purpose of deceiving the public.*” *Id.*
14 at *8 (emphasis added). And the court imposed the maximum penalty of \$325,000
15 for 650 separate false marking offenses. The fact that Nautilus continued falsely
16 marking its products despite the outcome of the *Icon Health* case is compelling
17 evidence that Nautilus did so with an intent to deceive.

18 **2. Nautilus patent litigation demonstrates that Nautilus knows**
19 **what its patents cover and when they expire.**

20 50. The fact that Nautilus has a history of aggressively enforcing its
21 patents, through the use of litigation, demonstrates that Nautilus is well aware of
22 when its patents expire and what they cover. Since 1980, Nautilus has sued its
23 competitors for alleged patent infringement of patents directed to weight lifting
24 exercise machines and parts, weight lifting exercise machines for the lower back,
25 stationary exercise machines simulating running and stepping motions, rod-based
26 exercise machines, clutch mechanisms for use on exercise bicycles, apparatus and
27 methods for exercising the abductor or adductor muscles, apparatus and methods
28

1 for exercising torso rotation muscles, and apparatus and methods for weight
2 selection. Nautilus has even sued its competitors for alleged patent infringement of
3 design patents for adjustable dumbbell and adjustable dumbbell base. In short,
4 Nautilus's litigation history demonstrates that it is well aware of what its patents
5 cover and when they expire.

6 51. Notably, among the patents Nautilus has litigated are the following
7 expired patents: U.S. Patent Nos. 3,858,873, 3,998,454; 4,456,245; 4,478,411; and
8 4,500,089. All of these expired patents are falsely marked on 2006 Nitro Plus
9 models of Biceps Curl, Lower Back, Abdominal, Leg Extension, Seated Leg Curl,
10 Gravitron Chin/Dip, Hip Abduction/Hip Adduction, Rear Delt/Pec Fly, Incline
11 Press, Overhead Press, Vertical Chest, Lateral Raise, Pullover, and Triceps
12 Extension.

13 52. In addition to illustrating Nautilus's knowledge of the expiration date
14 and scope of the patents, Nautilus's litigation history demonstrates that it actively
15 uses its patents to threaten its competitors from entering the market. It can be
16 inferred that Nautilus falsely marked its machines with the motive of deterring
17 competitors from introducing competitive products.

18 **3. Nautilus transactions demonstrate that Nautilus knows what**
19 **its patents cover and when they expire.**

20 53. Nautilus has engaged in numerous transactions that would have led it
21 to investigate the scope and expiration dates of its patents. These transactions
22 include purchase of intellectual property, assignment of its patents, and
23 payment/non-payment of maintenance fees.

24 54. Nautilus has knowledge of the scope and expiration dates of its patents
25 as demonstrated by, among other things, the acquisition of Nautilus International,
26 Inc. In January 1999, Nautilus, then doing business as Direct Focus, Inc., acquired
27 substantially all of the assets of Nautilus International, Inc., including all
28 intellectual property rights to the Nautilus name and products. Nautilus paid

1 approximately \$16.2 million and assumed \$2.6 million in liabilities. Nautilus must
2 have obtained knowledge through its due diligence in purchasing assets of Nautilus
3 International, Inc. regarding the scope and expiration dates of its patents.

4 55. Nautilus also has knowledge of the scope and expiration dates of its
5 patents as demonstrated by, among other things, the acquisition of StairMaster
6 Sports/Medical, Inc. ("StairMaster"). In February 2002, Nautilus, then doing
7 business as The Nautilus Group, Inc., acquired the assets of StairMaster for \$24.1
8 million. Nautilus must have obtained knowledge through its due diligence in
9 purchasing assets of StairMaster regarding the scope and expiration dates of its
10 patents.

11 56. Nautilus also has knowledge of the scope and expiration dates of its
12 patents as demonstrated by, among other things, assignments of its patents. Each
13 expired patent on Nitro Plus models was assigned numerous times. U.S. Patent No.
14 5,810,696 was assigned four times. U.S. Patent Nos. 3,858,873; 3,998,454; and
15 4,600,196 were each assigned six times. U.S. Patent Nos. 4,493,485 and 4,666,152
16 were each assigned eight times. U.S. Patent Nos. 4,257,592, 4,511,137, and
17 4,733,860 were each assigned nine times. And U.S. Patent Nos. 4,387,893;
18 4,456,245; 4,478,411; 4,500,089; and 4,589,656 were each assigned 11 times. Each
19 of these patents, except U.S. Patent Nos. 4,733,860 and 5,810,696, was twice
20 assigned as security interest: first on April 16, 1987 to Meritor Savings Bank, and
21 then on August 20, 1990 to First National Bank of Louisville. U.S. Patent
22 4,733,860 was assigned as security interest on August 20, 1990 to First National
23 Bank of Louisville. Each expired patent on Nautilus Commercial Series elliptical
24 trainers, E916 and EV916, and StairMaster StepMill 7000PT trainers was also
25 assigned numerous times. U.S. Patent No. 5,290,205 was assigned seven times.
26 U.S. Patent Nos. 5,060,938 and 5,380,258 were each assigned eight times. And
27 U.S. Patent No. 4,687,195 was assigned nine times. Furthermore, U.S. Patent No.
28 5,312,313, which does not cover the elliptical trainers or StepMill, was assigned ten

1 times. Each of these patents was assigned as security interest by StairMaster before
2 acquisition by Nautilus. U.S. Patent Nos. 4,687,195; 5,060,938; 5,312,313; and
3 5,380,258 were assigned as security interest on September 5, 1997 to ABN AMRO
4 Bank N.V. And U.S. Patent No. 5,290,205 patent was assigned as security interest
5 on December 16, 1999 to ABN AMRO Bank N.V.

6 57. The fact that Nautilus is very keenly aware of when its patents expire
7 is further demonstrated by its actions in connection with securing a \$100,000,000
8 line of credit. In that 2008 transaction, with Bank of America acting as the agent,
9 Nautilus collateralized the loan with, among other things, all of its *unexpired*
10 patents. As part of the transaction, Nautilus assigned these *unexpired* patents as
11 collateral for the loan. Notably absent from the assignment are the *expired* patents,
12 plainly showing that Nautilus is very well aware of which of its patents have
13 already expired. Nautilus's actions in the context of applying for and securing this
14 massive line of credit constitute substantial evidence that Nautilus manipulates its
15 patent portfolio for its own purposes and for the intent of deceiving others.

16 58. Nautilus also has knowledge of the scope and expiration dates of its
17 patents as demonstrated by, among other things, the payment of maintenance fees.
18 Facts suggest that Nautilus takes an active role in determining whether to let patents
19 expire for non-payment of maintenance fees. As detailed below, Nautilus has
20 allowed some of its patents to expire for non-payment by not paying the
21 maintenance fees through the duration of the patents. Thus, it appears that Nautilus
22 has decided that some of its patents are not worth the investment of maintenance
23 fees, and in deciding whether to pay maintenance fees on its patents, Nautilus
24 would have examined both the scope and expiration date of the patents.

25 59. Nautilus has paid every maintenance fee for the following patents: the
26 12th year fee for U.S. Patent No. 4,456,245 was paid on January, 16, 1996; the 12th
27 year fee for U.S. Patent No. 4,478,411 was paid on April 12, 1996; the 12th year
28 fee for U.S. Patent No. 4,493,485 was paid on July 8, 1996; the 12th year fee for

1 U.S. Patent 4,500,089 was paid on July 25, 1996; the 12th year fee for U.S. Patent
2 No. 4,589,656 was paid on November 10, 1997; the 12th year fee for U.S. Patent
3 No. 4,666,152 was paid on November 9, 1998; the 12th year fee for U.S. Patent No.
4 4,687,195 was paid on February 17, 1999; and the 12th year fee for U.S. Patent No.
5 4,733,860 was paid on September 22, 1999.

6 60. Nautilus has allowed the following patents to expire for non-payment
7 of maintenance fees: U.S. Patent No. 4,387,893 expired on June 14, 1995 for non-
8 payment; U.S. Patent No. 4,511,137 expired on April 16, 1997 for nonpayment;
9 U.S. Patent No. 4,600,196 expired on July 15, 1994 for non-payment; U.S. Patent
10 No. 5,060,938 expired on October 29, 2003 for non-payment; U.S. Patent No.
11 5,290,205 expired on March 1, 2002 for non-payment; U.S. Patent No. 5,380,258
12 expired on January 10, 2003 for non-payment; and U.S. Patent No. 5,810,696
13 expired on September 22, 2006 for non-payment.

14 4. Nautilus public filings demonstrate motive and other facts
15 showing Nautilus's intent to deceive the public, its
16 competitors and would-be developers of related machine
17 designs.

18 61. The motive for Nautilus to continue with this deceptive, reckless and
19 illegal conduct can be seen from Nautilus SEC filings, which clearly discuss how
20 the expiration and limited scope of Nautilus's patents threaten Nautilus's ability to
21 compete in the market.

22 62. Nautilus SEC filings repeatedly emphasize the importance of its
23 intellectual property portfolio and specifically refer to the business threat posed by
24 the expiration of its patents.

25 63. On April 13, 1999, Nautilus made the following statements in its filing
26 with the Securities and Exchange Commission on Form S-1/A:

- 27 • "Protecting our intellectual property is an important factor in maintaining
28 our competitive position in the fitness and mattress industries. If we do

1 not or are unable to adequately protect our intellectual property, our sales
2 and profitability could be adversely affected.”

- 3 • “We believe that our intellectual property is an important factor in
4 maintaining our competitive position in the fitness and mattress
5 industries. Accordingly, we have taken the following steps to protect our
6 intellectual property: We hold 17 United States patents and have applied
7 for three additional United States patents with respect to our Nautilus
8 products; We hold four patents relating to our Bowflex home fitness
9 equipment; We have applied for one patent relating to our airbeds.”
- 10 • “Of our four Bowflex patents, the most important covers our Power Rods.
11 This patent expires on April 27, 2004. The other three patents expire on
12 February 16, 2005, April 14, 2007, and January 4, 2010.”

13 64. In its 2002 Form 10-K, Nautilus stated:

- 14 • “Management believes all patents are important to the Company strategy
15 and has identified the patents on the Bowflex Power Rod resistance
16 technology and TreadClimber as the most significant to our business.”
- 17 • “[T]he main U.S. patent on our Bowflex Power Rod resistance
18 technology expires on April 27, 2004.”
- 19 • “This expiration of our patents could trigger the introduction of similar
20 products by competitors.”

21 65. Similarly, in its March 15, 2004 filing with the Securities and
22 Exchange Commission on Form 10-K, Nautilus made the following statements:

- 23 • “We believe all patents are important to our strategy.”
- 24 • “[T]he main U.S. patent on our Bowflex Power Rod resistance technology
25 expires on April 27, 2004.”
- 26 • “The expiration of our patents could trigger the introduction of similar
27 products by competitors.”

1 66. More recently, in its March 8, 2010 filing with the Securities and
2 Exchange Commission on Form 10-K, Nautilus stated:

3 "We own a broad array of patents and patent rights, both issued and
4 pending, covering our fitness equipment. These patents cover a variety
5 of technologies, some of which are utilized in the following products:
6 TreadClimber™; variable stride ellipticals; selectorized weights;
7 recumbent bicycles; and the Bowflex™ Revolution™. Patent
8 protection for these technologies extends as far as 2020, with none
9 expiring prior to 2011. Expiration of these and other patents could
10 trigger the introduction of similar products by our competitors. Patent
11 protection has ended for our rod-based home gyms."

12 67. Nautilus's intent to deceive can also be inferred from its statements.
13 Nautilus has admitted that it uses its patents to prevent entry of its competitors. For
14 example, in its March 16, 2009 filing with the Securities and Exchange
15 Commission on Form 10-K, Nautilus stated:

- 16 • "Trademarks, patents and other forms of intellectual property are vital to
17 the success of our business and an essential factor in maintaining our
18 competitive position in the health and fitness industry."
19 • "Building our intellectual property portfolio is an important factor in
20 maintaining our competitive position in the health and fitness equipment
21 industry. We have followed a policy of filing applications for U.S. and
22 foreign patents on inventions, new designs and improvements that we
23 deem valuable to our business. We protect our proprietary rights
24 vigorously and take prompt, reasonable actions to prevent counterfeit
25 reproductions or other infringement on our intellectual property."
26 • "Protecting our intellectual property is an essential factor in maintaining
27 our competitive position in the health and fitness industry. If we do not,
28 or are unable to, adequately protect our intellectual property, other parties

might use our technology to market their products, which could have a material adverse impact on our sales, profitability and cash flows.”

- “There are limited technological, manufacturing or marketing barriers to entry into the fitness equipment markets in which we compete. Like many companies in the industry, we have sought and received patent and trademark protection on our products in an effort to protect our competitive position.”

68. Nautilus has consistently asserted the importance of its patents in its 10-K forms:

- “Building our intellectual property portfolio is an important factor in maintaining our competitive position in the fitness and mattress industries. If we do not or are unable to adequately protect our intellectual property, our sales and profitability could be adversely affected. We are very protective of these proprietary rights and take action to prevent counterfeit reproductions or other infringing products.” (2002-2004)
- “Building our intellectual property portfolio is an important factor in maintaining our competitive position in the fitness equipment and apparel industries. If we do not, or are unable to, adequately protect our intellectual property, our sales and profitability could be adversely affected. We are very protective of these proprietary rights and take action to prevent counterfeit reproductions or other infringing products.” (2005)
- “Building our intellectual property portfolio is an important factor in maintaining our competitive position in the fitness equipment and apparel industries. We have followed a policy of filing applications for the U.S. and foreign patents on inventions, new designs and improvements that we deem valuable to our business. If we do not, or are unable to, adequately

1 protect our intellectual property, our sales and profitability could be
2 materially adversely affected. We protect our proprietary rights
3 vigorously and take prompt action to prevent counterfeit reproductions of
4 or other infringing on our intellectual property.” (2006-2007)

- 5 • “Building our intellectual property portfolio is an important factor in
6 maintaining our competitive position in the health and fitness equipment
7 industry. We have followed a policy of filing applications for U.S. and
8 foreign patents on inventions, new designs and improvements that we
9 deem valuable to our business. If we do not, or are unable to, adequately
10 protect our intellectual property, other parties might use our technology to
11 market their products, which could have a material adverse impact on our
12 sales, profitability and cash flows. We protect our proprietary rights
13 vigorously and take prompt, reasonable action to prevent counterfeit
14 reproductions of or other infringement on our intellectual property.”
15 (2008)

- 16 • “Protecting our intellectual property is an important factor in maintaining
17 our competitive position in the fitness and mattress industries. If we do
18 not, or are unable to, adequately protect our intellectual property, our
19 sales and profitability could be adversely affected. Accordingly, we have
20 taken the following protective measures: We hold 17 United States
21 patents and have applied for three additional United States patents with
22 respect to our Nautilus products; We hold 20 United States patents and
23 have 25 applications pending internationally with respect to our Schwinn
24 Fitness products; We hold four patents relating to our Bowflex home
25 fitness equipment; We have applied for one patent relating to our
26 Nautilus Sleep Systems.” (2001)

- 27 • “Protecting our intellectual property is an essential factor in maintaining
28 our competitive position in the health and fitness industries. If we do not

1 or are unable to adequately protect our intellectual property, our sales and
2 profitability could be adversely affected. We currently hold a number of
3 patents and trademarks and have several patent and trademark
4 applications pending.” (2002-2007)

- 5 • “Protecting our intellectual property is an essential factor in maintaining
6 our competitive position in the health and fitness industry. If we do not,
7 or are unable to, adequately protect our intellectual property, our sales
8 and profitability may be adversely affected. We currently hold
9 approximately 115 patents and trademarks and have approximately 65
10 patent and trademark applications pending in the United States.” (2008)

11 69. From the above declarations and statements, it is clear that Nautilus
12 uses its patents to prevent entry of its competitors into the market. Given the
13 “limited technical, manufacturing or marketing barriers to entry,” it can be inferred
14 that Nautilus had the motive to deter its competitors from entry by falsely marking
15 its machines with many expired and non-applicable patents.

16 70. Nautilus has marked its equipment with, and used in advertising,
17 marketing and promotional media, expired patents and patents that do not cover the
18 marked or referenced products in violation of 35 U.S.C. § 292. Despite clear
19 knowledge of this violation, it continues to do so.

20 71. Upon information and belief, Nautilus’s sales of its falsely marked
21 exercise machines are substantial.

22 72. Upon information and belief, Nautilus falsely marked products in an
23 attempt to prevent competitors, Sukumar, and SCSRA from designing, using,
24 and/or selling competing products.

25 73. Upon information and belief, Nautilus falsely marked its products for
26 the purpose of deceiving the public, competitors, Sukumar, and SCSRA into
27 believing that something contained in or embodied in Nautilus products was
28 covered by the falsely marked patents.

1 74. Nautilus has wrongfully, and with deceptive intent, conveyed to the
2 public and to its competitors that it maintains patent rights that it does not possess,
3 and as a result, Nautilus has benefited commercially and financially through false
4 marking of patent rights.

5 75. Sukumar and SCSRA seek an award against Nautilus in the maximum
6 amount allowed by law pursuant to 35 U.S.C. § 292, as well as compensatory
7 damages for the injuries that they have incurred as a result of Nautilus's conduct.
8

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Sukumar and SCSRA request the Court to enter judgment
11 for them against Nautilus as follows:

12 1. Decree that Nautilus has falsely marked products in violation of 35
13 U.S.C. § 292;

14 2. Pursuant to 35 U.S.C. § 292, an award against Nautilus in the form of
15 a civil monetary fine for each and every false marking "offense";

16 3. Recovery adequate to compensate for the injuries that Sukumar and
17 SCSRA have suffered because of Nautilus's false marking;

18 4. An accounting for any falsely marked Nautilus product not otherwise
19 included herein and an award by the Court of additional sums for any such falsely
20 marked products; and

21 5. Such other and further relief, at law or in equity, to which Sukumar
22 and SCSRA are justly entitled.
23
24
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28

1 DATED: October 20, 2010

HILL FARRER & BURRILL LLP

2
3 By: 

4 Stephen J. Tomasulo
5 Attorneys for Plaintiffs, PONANI
6 SUKUMAR and SOUTHERN
7 CALIFORNIA STROKE
8 REHABILITATION ASSOCIATES,
9 INC.
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HILL, FARRER & BURRILL LLP
A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW
ONE CALIFORNIA PLAZA, 37TH FLOOR
300 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071-3147

JURY TRIAL DEMANDED

Pursuant to Fed. R. Civ. 38(b), Plaintiffs Ponani Sukumar and Southern California Stroke Rehabilitation Associates, Inc. hereby demand a trial by jury on all matters and issues triable by jury.

DATED: October 20, 2010

HILL FARRER & BURRILL LLP

By: 

Stephen J. Tomasulo
Attorneys for Plaintiffs, PONANI
SUKUMAR and SOUTHERN
CALIFORNIA STROKE
REHABILITATION ASSOCIATES,
INC.

HFB 994260.1 S9077001

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SOUTHERN CALIFORNIA STROKE
REHABILITATION ASSOCIATES, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PONANI SUKUMAR, an individual, and SOUTHERN
CALIFORNIA STROKE REHABILITATION
ASSOCIATES, INC., a California corporation,
PLAINTIFF(S)

v.

NAUTILUS, INC., a Washington corporation,
DEFENDANT(S).

CASE NUMBER

CV10-7930 *DMC
(RZ)*

SUMMONS

TO: DEFENDANT(S): _____

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached ☒ complaint ☐ _____ amended complaint ☐ counterclaim ☐ cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, Stephen J. Tomasulo, whose address is 300 South Grand Avenue, 37th Floor, Los Angeles, CA 90071. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk, U.S. District Court

Dated: 10-21-10

By: _____

TANYA DURANT

Deputy Clerk

(Seal of the Court)



[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3)].

Stephen J. Tomasulo (SBN 181013)
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Los Angeles, CA 90071
Telephone: 213-621-0882
Email: stomasulo@hillfarrer.com
Attorneys for Plaintiffs PONANI SUKUMAR and
SOUTHERN CALIFORNIA STROKE
REHABILITATION ASSOCIATES, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PONANI SUKUMAR, an individual, and SOUTHERN
CALIFORNIA STROKE REHABILITATION
ASSOCIATES, INC., a California corporation,
PLAINTIFF(S)

v.

NAUTILUS, INC., a Washington corporation,
DEFENDANT(S).

CASE NUMBER

CV10-7930 (22x) ^{DMG}

SUMMONS

TO: DEFENDANT(S): _____

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached ☒ complaint ☐ _____ amended complaint ☐ counterclaim ☐ cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, Stephen J. Tomasulo, whose address is 300 South Grand Avenue, 37th Floor, Los Angeles, CA 90071. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk, U.S. District Court

Dated: 10-21-10

By: 
Deputy Clerk

(Seal of the Court)

[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3)].

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge Dolly Gee and the assigned discovery Magistrate Judge is Ralph Zarefsky.

The case number on all documents filed with the Court should read as follows:

CV10 - 7930 DMG (RZx)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

=====

NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

☒ **Western Division**
312 N. Spring St., Rm. G-8
Los Angeles, CA 90012

☐ **Southern Division**
411 West Fourth St., Rm. 1-053
Santa Ana, CA 92701-4516

☐ **Eastern Division**
3470 Twelfth St., Rm. 134
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**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET**

I (a) PLAINTIFFS (Check box if you are representing yourself <input type="checkbox"/>) PONANI SUKUMAR, an individual, and SOUTHERN CALIFORNIA STROKE REHABILITATION ASSOCIATES, INC., a California corporation	DEFENDANTS NAUTILUS, INC., a Washington corporation
(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.) Stephen J. Tomasulo (SBN 181013) HILL FARRER & BURRILL LLP 300 South Grand Ave., 37th Floor Los Angeles, CA 90071 Tel: 213-621-0882; Email: stomasulo@hillfarrer.com	Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an X in one box only.) <input type="checkbox"/> 1 U.S. Government Plaintiff <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 2 U.S. Government Defendant <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.) <table style="width:100%; border: none;"> <tr> <td style="width:40%; border: none;">Citizen of This State</td> <td style="width:10%; border: none; text-align: center;">PTF</td> <td style="width:10%; border: none; text-align: center;">DEF</td> <td style="width:10%; border: none; text-align: center;">1</td> <td style="width:30%; border: none;">Incorporated or Principal Place of Business in this State</td> <td style="width:10%; border: none; text-align: center;">PTF</td> <td style="width:10%; border: none; text-align: center;">DEF</td> <td style="width:10%; border: none; text-align: center;">4</td> <td style="width:10%; border: none; text-align: center;">4</td> </tr> <tr> <td style="border: none;">Citizen of Another State</td> <td style="border: none; text-align: center;">2</td> <td style="border: none; text-align: center;">2</td> <td style="border: none; text-align: center;">2</td> <td style="border: none;">Incorporated and Principal Place of Business in Another State</td> <td style="border: none; text-align: center;">5</td> <td style="border: none; text-align: center;">5</td> <td style="border: none; text-align: center;">5</td> <td style="border: none; text-align: center;">5</td> </tr> <tr> <td style="border: none;">Citizen or Subject of a Foreign Country</td> <td style="border: none; text-align: center;">3</td> <td style="border: none; text-align: center;">3</td> <td style="border: none; text-align: center;">3</td> <td style="border: none;">Foreign Nation</td> <td style="border: none; text-align: center;">6</td> <td style="border: none; text-align: center;">6</td> <td style="border: none; text-align: center;">6</td> <td style="border: none; text-align: center;">6</td> </tr> </table>	Citizen of This State	PTF	DEF	1	Incorporated or Principal Place of Business in this State	PTF	DEF	4	4	Citizen of Another State	2	2	2	Incorporated and Principal Place of Business in Another State	5	5	5	5	Citizen or Subject of a Foreign Country	3	3	3	Foreign Nation	6	6	6	6
Citizen of This State	PTF	DEF	1	Incorporated or Principal Place of Business in this State	PTF	DEF	4	4																				
Citizen of Another State	2	2	2	Incorporated and Principal Place of Business in Another State	5	5	5	5																				
Citizen or Subject of a Foreign Country	3	3	3	Foreign Nation	6	6	6	6																				

IV. ORIGIN (Place an X in one box only.)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify):	<input type="checkbox"/> 6 Multi-District Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judge
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V. REQUESTED IN COMPLAINT: JURY DEMAND: ☒ Yes ☐ No (Check 'Yes' only if demanded in complaint.)

CLASS ACTION under F.R.C.P. 23: ☐ Yes ☐ No **MONEY DEMANDED IN COMPLAINT:** \$ _____

VI. CAUSE OF ACTION (Cite the U. S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
 28 U.S.C. §§ 1331 and 1338, and 35 U.S.C. § 292(b)

VII. NATURE OF SUIT (Place an X in one box only.)

<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Act <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Info. Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes	<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Fed. Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury-Med Malpractice <input type="checkbox"/> 365 Personal Injury-Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus-Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability <input type="checkbox"/> 22 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 American with Disabilities - Employment <input type="checkbox"/> 446 American with Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus/Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <input type="checkbox"/> 820 Copyrights <input checked="" type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 61 HIA(1395ff) <input type="checkbox"/> 862 Black Lung (923) 405(g)) <input type="checkbox"/> 863 DIWC/DIWW 405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609
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CV10-7930

FOR OFFICE USE ONLY: Case Number: _____
AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET**

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? ☒ No ☐ Yes

If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? ☒ No ☐ Yes

If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply) ☐ A. Arise from the same or closely related transactions, happenings, or events; or
☐ B. Call for determination of the same or substantially related or similar questions of law and fact; or
☐ C. For other reasons would entail substantial duplication of labor if heard by different judges; or
☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

(a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH named plaintiff resides.

☐ Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles County	

(b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH named defendant resides.

☐ Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	Washington

(c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH claim arose.
 Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles County	

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties

Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER): Stephen J. Tomasulo Date October 20, 2010

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))